No. 79-1977

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

FREDERICO RODRIGUEZ,

*Petitioner,*

—against—

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

*Respondent.*

LUIS PEREZ,

*Petitioner,*

—against—

ARYA NATIONAL SHIPPING LINE, LTD.,

*Respondent.*

SRECKO BARULEC,

*Petitioner,*

—against—

OVE SKOU, R.A.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF RESPONDENT, OVE SKOU, R. A.

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## Questions Presented for Review

1. Has the particular conflict-of-interest exception to section 33(b) of the Longshoremen's and Harborworkers' Compensation Act, as announced by this Court in *Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 525 (1956), been removed by subsequent Congressional amendments?

2. Is the conflict-of-interest exception to section 33(b), if any, limited to demonstrated conflicts of interest?

## TABLE OF CONTENTS

PAGE

Questions Presented for Review ..... i

Table of Authorities ..... iii

Statement of the Case ..... 1

Summary of Argument ..... 4

ARGUMENT ..... 6

POINT I—

The LHWCA, as Originally Enacted and Subsequently Amended in 1938, 1959 and 1972, Provides for the Assignment of a Third Party Cause of Action to the Employer ..... 6

POINT II—

In an Exception to Section 33(b) Exists, That Exception Is Limited to the Exception Stated by This Court in *Czaplicki* v. *Hoegh Silvercloud* and Petitioner Has Failed to Prove Facts Bringing the Claim Within the Exception ..... 29

CONCLUSION ..... 34

## Table of Authorities

*Cases cited:* PAGE

*American Stevedores, Inc.* v. *Porello,* 330 U.S. 446 (1947) ..... 19, 30

*Bloomer* v. *Liberty Mutual Ins. Co.,* 445 U.S. 74 (1980) ..... 24, 26

*Caldwell* v. *Ogden Sea Transport, Inc.,* 618 F.2d 1037 (4th Cir. 1980) ..... 20

*Czaplicki* v. *Hoegh Silvercloud,* 351 U.S. 525 (1956) ..... 4, 5, 13, 15, 16, 19, 26, 29, 30

*Director, Office of Workers' Compensation Programs* v. *Rasmussen,* 440 U.S. 29 (1979) ..... 14, 29

*Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256 (1979) ..... 20, 22, 24, 25, 26, 28

*Hernandez* v. *Costa Armatori, S.p.A.,* 467 F. Supp. 1064 (E.D.N.Y. 1179), *aff'd. mem.,* 622 F.2d 573 (2d Cir. 1980) ..... 31

*Johnson* v. *Sioux City & New Orleans Barge Lines, Inc.,* 629 F.2d 1244 (7th Cir. 1980) ..... 25, 27

*Johnson* v. *Sword Line, Inc.,* 257 F.2d 541 (3rd Cir. 1958) ..... 17, 26

*Joyner* v. *F & B Enterprises, Inc.,* 448 F.2d 1185 (D.C. Cir. 1971) ..... 23

*McClendon* v. *Charente S.S. Co.,* 348 F.2d 298 (5th Cir. 1965) ..... 19, 26, 28

*Moore* v. *Hechinger,* 127 F.2d 746 (D.C. Cir. 1942) ..... 23

*Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977) ..... 24

PAGE

*PEPCO* v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965) ....18, 28, 29
*Pillsbury* v. *United Engineering Co.*, 342 U.S. 197 (1952) ....28, 29

*Rodriguez* v. *Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir. 1980) .... 20
*Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) ....4, 10, 27

*Sabol* v. *Merritt Chapman & Scott Corp.*, 241 F.2d 765 (2d Cir. 1957) ....16, 24
*Seas Shipping Co.* v. *Sieracki*, 328 U.S. 25 (1946) .... 27

*Toomey* v. *Waterman S.S. Corp.*, 123 F.2d 718 (2d Cir. 1941) .... 24

*Valentino* v. *Rickmers Rederei, G.M.B.H.*, 552 F.2d 466 (2d Cir. 1977) .... 32

*Westchester Rockland Newspapers, Inc.* v. *Kimball*, 50 N.Y.2d 575, 430 N.Y. Sup.2d 574 (1980) .... 33
*White* v. *United States*, 507 F.2d 1101 (5th Cir. 1975) .. 24

*Statutes and Rules:*

73 Stat. 391 .... 7

44 Stat. 1429, 1440 .... 6

52 Stat. 1168 .... 6

33 U.S.C. §933(b) ....7, 15

33 U.S.C. §905(b) .... 15

F. R. Civ. P. 19(a) .... 21

F. R. Civ. P. 56 .... 3

PAGE

*Other Authorities:*

H.R. Rep. No. 1945, 75th Cong., 3d Sess. ..... 7, 17

H.R. Rep. No. 229, 86th Cong., 1st Sess. ..... 8, 9, 18

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. ..... 27

S. Rep. No. 428, 86th Cong., 1st Sess. ..... 14, 17, 18

S. Rep. No. 92-1125, 92d Cong., 2d Sess. ..... 25

105 Cong. Rec. 5560-5562 (1959) ..... 8

Hearings on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act before a Special Subcommittee on Education and Labor of the House of Representatives, 84th Cong., 2d Sess. (May 23, 24 and June 11, 1956) ..... 10, 11, 12, 13, 17, 25, 31

Gegan, *The Compensation Carrier's Right to Restitution for Medical Expenses Through a Lien on the Employee's Tort Recovery,* 52 St. John's L. Rev. 395 (1978) ..... 7

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## BRIEF OF RESPONDENT, OVE SKOU, R. A.

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### Statement of the Case

Petitioner Barulec commenced this action by the filing of a complaint in the United States District Court for the

Southern District of New York on or about February 22, 1978. (91a).* Petitioner sought to recover damages for injuries allegedly sustained on January 6, 1975 while working in the employ of Universal Maritime Service Corp. and assisting in the discharge of respondent's vessel.

Petitioner's employer filed a first report of accident pursuant to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) for the injuries allegedly sustained on January 6, 1975 (109a-112a). Thereafter, compensation was paid by the employer's insurer, Midland Insurance Co., without an award from January 10, 1975 until March 14, 1975 (113a-116a). On March 25, 1975, a claim for additional compensation was made by the petitioner's attorneys and a conference in the matter was requested at that time as well as in later letters of August 18, 1975 and December 22, 1975 (117a-119a).

As noted in the request dated December 22, 1975, petitioner's attorneys sought to have "the case scheduled for an early conference for final disposition" (119a). A conference was held on February 11, 1976 before the United States Department of Labor, Office of Worker's Compensation Programs at which time a settlement of the claim was reached (120a-124a). The agreement was memorialized in a Department of Labor Memorandum of Informal Conference dated February 11, 1976, wherein it was stated that compensation was to be paid in the amount of $2,282.01 for temporary total disability for 12-3/7th weeks and in the amount of $3,172.78 for a 6% permanent partial disability of the left leg. Payment of compensation in accordance with this memorandum was made by the compensation insurance company and notice of this payment was

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* References followed by "a" refer to pages in the Joint Appendix.

given to the United States Department of Labor on February 13, 1976 (125a-127a).

Petitioner does not dispute that he accepted compensation under the Memorandum dated February 11, 1976 and did not commence suit in this matter until February 22, 1978, more than two years after the date of the award.

Respondent moved, pursuant to Federal Rules of Civil Procedure 56, for summary judgment dismissing the complaint of the plaintiff by Notice of Motion dated December 8, 1978 (93a-127a). Petitioner's opposition to the motion consisted solely of an attorney's hearsay affidavit (128a-130a). In a decision dated May 31, 1979, the district court ruled that petitioner had accepted compensation under an award in a compensation order and had not commenced suit within six months of the award (Supp. App. to Pet. for Cert. 1g-17g). The court also held, however, that there is a conflict-of-interest exception to section 33(b) of the LHWCA which, as a result of the 1972 Amendments to the LHWCA, must be proven rather than presumed. Holding that petitioner bears the burden of proving facts sufficient to bring himself within this exception to the statutory rule, the court granted petitioner 45 days within which to submit competent evidence establishing the existence of a conflict of interest. The motion for summary judgment was denied, therefore, without prejudice to renewal after 45 days.

By Notice of Motion dated July 18, 1979, respondent renewed its motion for summary judgment (142a-148a). Petitioner presented no evidence of a conflict of interest (149a-161a). The Court, by endorsement dated August 8, 1979, granted the motion for summary judgment noting petitioner's failure to submit any evidence tending to show that a conflict of interest existed (162a-163a).

On appeal, the Second Circuit affirmed the judgment of the district court for the reasons stated in *Rodriguez* v.

*Compass Shipping Co., Ltd.* (Supp. App. to Pet. for Cert. 1c). In *Rodriguez,* the Court of Appeals held that the conflict-of-interest exception announced in *Czaplicki* v. *Hoegh Silvercloud,* 351 U.S. 525 (1956), is limited to the unique facts which existed in *Czaplicki.* Those facts were not duplicated either here or in the *Rodriguez* decision.

This Court has granted certiorari to review the decision of the Second Circuit limited to questions concerning the scope and continued viability of any conflict-of-interest exception to section 33(b) of the LHWCA.*

## Summary of Argument

Respondent contends that there is no conflict-of-interest exception to the assignment of third party causes of action under section 33(b) of the LHWCA. Prior to 1959, this Court found such an exception in *Czaplicki* v. *Hoegh Silvercloud,* 351 U.S. 525 (1956), because the assignee was also the insurer of one of the defendants in the third party lawsuit. Consequently, the claim was held by the one party most likely to suffer if the cause of action was successfully enforced. A similar conflict was presented in nearly every longshoreman's third party action as a result of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956).

Congress was made aware of the conflict-of-interest problem in 1956, resulting in the drafting of an amendment

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*** The Amicus brief submitted in support of petitioners ignores the order of this Court which granted certiorari. Thus, in Point 3 of its brief, Amicus seeks to quarrel with the district court's and Court of Appeals' conclusion that petitioners received compensation under an award in a compensation order. Since this Court has declined review of this question, Respondent will not reply to the argument of Amicus counsel.**

to section 33(b) which was enacted in 1959. This amendment gave the employee six months after acceptance of compensation under an award within which to bring suit. It also gave the employer a one-fifth share in the recovery as an incentive to prosecute assigned meritorious third party claims. Congress did not abrogate the assignment, but chose to assign the claim after a reasonable period of inaction by the employee.

Respondent alternatively contends that if a conflict-of-interest exception exists, the exception can be no broader than the limited exception found in *Czaplicki*. Petitioner's contention that the cause of action revests when the assignee, for whatever reason, does not commence suit must be rejected. Such a rule would nullify the intended effect of section 33(b). It would replace certainty as to the proper party to bring suit with uncertainty. Moreover, it would remove the independent assessment of these claims by insurers or employers. Such assessment would eliminate those cases which a more objective eye would view as not meritorious or of insufficient value to warrant a lawsuit.

Petitioner has failed to present any competent evidence of a conflict of interest. Without such evidence, the granting of defendant's motion for summary judgment was correct and should be affirmed.

## ARGUMENT

### POINT I

**The LHWCA, as Originally Enacted and Subsequently Amended in 1938, 1959 and 1972, Provides for the Assignment of a Third Party Cause of Action to the Employer.**

***Legislative History***

From its enactment, the LHWCA provided that third party causes of action held by persons entitled to compensation would be assigned to the employer so long as payment of compensation was made. In its original form, section 33(b) automatically assigned all third party causes of action to the employer upon acceptance of any compensation by the employee, 44 Stat. 1429, 1440 (1927). In 1938, the statute was amended to postpone the assignment of the cause of action until the employee had accepted compensation "under an award in a compensation order." 52 Stat. 1168 (1938). The amendment was intended to forestall the assignment for a reasonable time to allow consideration by the employee. The amendment was explained in the House Committee report as follows:

> "Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the Deputy Commissioner, giving opportunity to the injured person . . . *to consider the acceptance of compensation from the employer with the resulting loss of right to bring suit in damages against the third party,* or a refusal of compensation

> so as to pursue the remedy against the third party alleged to be liable for the injury." H.R. Rep. No. 1945, 75 Cong., 3d Sess. at 9. (emphasis added).

The assignment was still envisioned by Congress as part of the *quid pro quo* for the employee's right to compensation. Thus, if he declined compensation he was entitled to pursue the third party claim. Acceptance of compensation under an award, however, resulted in the relinquishment of his rights to bring a third party action. *See* Gegan, *The Compensation Carrier's Right to Restitution for Medical Expenses Through a Lien on the Employer's Tort Recovery,* 52 St. John's L. Rev. 395, 397 n.8 (1978) (discussing the New York State Workmen's Compensation statute upon which the LHWCA was modeled). It cannot be clearer from the House Report that Congress did not envision any exceptions to the assignment once compensation had been accepted under an award in a compensation order.

This section, as enacted in 1959, read as follows:

> "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." * 73 Stat. 391 (1959).

As in its prior forms, the statute is clear and unambiguous. The assignment gives the employer "all right of the person entitled to compensation to recover damages against

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* In 1972, the section was amended to add a reference to the Benefits Review Board which was created in the course of the 1972 amendments. 33 U.S.C. §933(b) (1976). This technical amendment did not affect the issues presented on this appeal.

such third person. . . ." This assignment is conditioned solely upon the receipt of compensation under an award in a compensation order and the failure by the employee to commence suit against the third person within six months after the award.

The legislative history of the 1959 Amendment underscores the careful consideration given by Congress to various problems which had arisen as a result of an interplay between the 1938 language and subsequent judicial developments. The amendment originated in the 84th Congress and extensive hearings were held by a subcommittee in 1956. During the 85th Congress the legislation was reported favorably by a House Committee and passed by the House. Because of an amendment on an entirely different subject in the Senate, the House did not act on the bill as passed by the Senate. In the 86th Congress, a bill which was identical to the bill which had been previously passed by the House was re-introduced, reported favorably by a Committee and passed by the House on April 8, 1959. H.R. Rep. No. 229, 86th Cong., 1st Sess. (hereinafter H.R. Rep. No. 229); 105 Cong. Rec. 5560-5562 (1959).

The bill originally passed by the House was longer and more convoluted than the present form of the statute. The Senate shortened the House bill by amendment and the Senate version was subsequently adopted by the House. The original House bill, nonetheless, had the same purpose as the ultimate version of the statute, although it incorporated additional safeguards for the employee as well as various technical provisions which were deleted by the Senate amendment. The original House bill provided for the six month period within which to commence suit but also required the employer or carrier to give notice to the employee at least thirty days prior to the expiration of the six month period that failure of the employee to com-

mence suit would result in the assignment. Failure to give notice extended the six month period until thirty days after the employer or insurer gave notice.

The House Report and the extensive 1956 hearings demonstrate that Congress was acutely aware of the conflict-of-interest problem and had drawn this legislation to resolve that problem. The House Report states "[d]evelopments under the act which concerned the Subcommittee on Safety and Compensation have been . . . the automatic assignment of a third-party cause of action to the employer and the refusal by the employer to pursue the third-party claim because of a conflict of interest. . . ." H.R. Rep. No. 229 at 3. The report also summarizes the law as perceived, and relied upon, by Congress in 1959:

> "Once a compensation award is made to the employee, the right of action against the responsible third party is automatically assigned to the employer. Thereafter, the employee has no control over subsequent action with respect to pursuing or settlement of the claim."

The report summarizes the amended subsection (b) in pertinent part as follows:

> "Subsection (b) provides that if, in the situation referred to above, the employee or his survivors or legal representatives do not commence action against the third person within the time limit set forth above [six months], the failure will operate to assign the cause of action to the employer or his insurance carrier. . . ." H.R. Rep. No. 229 at 3.

The hearings on this bill were held in May and June, 1956. *Hearings on Bills relating to the Longshoremen's and Harbor Workers' Compensation Act before a Special*

*Subcommittee of the Committee on Education and Labor of the House of Representatives,* 84th Cong., 2nd Sess. (May 23, 24 and June 11, 1956) (hereinafter Hearings, 84th Cong.). During these hearings, the problem of conflict of interest between the assignee and employer was the subject of numerous lengthy discussions. For example, on May 23, 1956, the first statement made to the subcommittee was by Congressman Zelenko, one of the authors of H.R. 5357 which had incorporated the basic provisions relating to sections 33(a) and (b) in the bill eventually passed in the House on April 8, 1959. Congressman Zelenko began his testimony by pointing out and inserting in the subcommittee's record the decision *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). Hearings, 84th Cong. at 1-11. Congressman Zelenko then explained the genesis of his proposal as well as its intended effect:

> "It has been generally acknowledged that the Longshoremen and Harbor Workers' Compensation Act is modeled substantially after the New York State Workers Compensation Act. Using the latter statute I have modeled H.R. 5357 from one of its relevant sections which has functioned in a manner satisfactory to all parties concerned.
>
> I believe that it is fair in all respects both to the employer and to the employee.
>
> The employee is protected in his claim against the third party at all times whether he accepts compensation or not. An assignment of his rights to the employer comes into being only when he fails to avail himself of third-party remedy. The employer is also protected. He may acquire the right of assignment and then proceed to recoup his loss. The elimination of all rights of the employer to an assignment in the instant situation would be grossly unfair. *On the other*

> *hand, H.R. 5357 avoids and eliminates the circumstances indicated by Judge Black* [referring to the dissenting opinion in *Ryan*, 350 U.S. at 135, 144-46] *where to the detriment of the employee, the employer under the present section and by reason of the Ryan decision may decide not to proceed with the third-party action.*
>
> H.R. 5357 provides an added incentive to the employer when he once acquires the right of assignment, to recover as much as possible from the third party where the longshoreman himself has filed [sic] to proceed. It provides that in the event of an action under an assignment to the employer, the employee receives only two-thirds of any excess of the amount paid in compensation. This provision differs from the one now in existence where, if any sum is recovered by the employer over the amount paid or due in compensation it is all turned over to the employee. The employer should have some inducement to commence and prosecute the litigation. *Furthermore, in a situation similar to the Ryan case, where the employer might be obliged to pay the total cost of the recovery in a third-party action, his loss would be mitigated. He would not be burdened with the entire recovery, but only with two-thirds of it.*" Hearings, 84th Cong. at 12-13 (emphasis added).

Congressman Zelenko continued his explanation under questioning by the members of the subcommittee:

> MR. MCDOWELL. Is that the reason for the 6-month provision?
>
> MR. ZELENKO. I think that there should be some length of time in which the parties can learn their rights. Most of the time the longshoreman finds his own lawyer, but I have seen and heard of cases where

many times this man does not know his rights, and sometimes through his employer, he finds out that he has certain rights because the employer is interested in getting this money back. If I had urged 10119, it would have been grossly unfair to the employer. In other words, it would be practically left up to the longshoreman, and if he did not go ahead, the employer would lose any possible chance of getting back his compensation money.

The Ryan situation does not occur at all times, that is, where the company both loads and unloads a vessel. It happens frequently but not too often. *However, this way the right of assignment is acquired by law by the employer when the employee, for whatever reason, does not assert his rights.*

I hope I have answered your questions by trying to show what the situation in the Ryan case would be. That is the factual and the legal situation, and assuming we had the Ryan case pending at this time, the employer would lose any interest in proceeding with it, and the longshoreman would suffer. That is what Judge Black was talking about. Under H.R. 5357 both parties go in there and if the longshoreman chooses to go ahead, he does so; and if he does not go ahead, the employer starts a lawsuit in his own behalf only after the longshoreman has had the opportunity to do so, and he does not want to avail himself of it, then they give the employer this right of assignment automatically, so he gets the same measure of protection." Hearings, 84th Cong. at 14-15 (emphasis added).

This same provision was repeatedly discussed in the course of the subsequent hearings. *E.g.*, Hearings, 84th Cong. at 19-20, 43-45 (Congressman Roosevelt raises the

possibility that the employer for business reasons might compromise the claim solely for the lien amount and he suggests that the employee might be better off holding the claim himself), 50-51, 59 (facts of *Czaplicki* v. *Hoegh Silvercloud,* 351 U.S. 525 (1956) presented), 60-62 (Circuit Court opinion in *Czaplicki* cited, facts reviewed and certiorari by Supreme Court noted), 83-84, 95-96, 99, 102, 105-07, 110, 116-18, 125-27, 132.

In the Senate, the amended bill deleted the 30-day notice to the employee making the assignment solely contingent upon the receipt of compensation under an award in a compensation order, and the employee's failure to commence suit within six months of the compensation award. The Senate Report explained the purpose and effect of the bill as follows:

> "The bill as amended by the committee would revise section 33 of the Act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the Act. . . . The committee believe that in theory and practice this is sound approach to what has been a difficult problem. As embodied in the committee amendment, the principle would be applied with due recognition of the equities and rights of all who are involved.
>
> . . . In the event that an employee does not elect to sue for damages within 6 months of the compensation award the employer is assigned the cause of action. In the event that the employer institutes proceedings and makes a recovery, the employee receives four-fifths of the amount after necessary expenses, . . . and all benefits and compensation have been deducted. Thus, by giving the employer a reasonable (one-fifth) share in the net recovery and [sic] incentive is pro-

> vided not to compromise a suit only for the amount of compensation but to protect the interests of the employee as much as possible." S. Rep. No. 428, 86th Cong., 1st Sess. at 2 (1959).

It is eminently clear from the language of the statute, the legislative history, the legislative reports and the legislative hearings, that Congress considered various alternatives, was aware of the conflict-of interest-problem and chose to enforce an absolute assignment of the third party claim following a reasonable period of inaction by the employee. This choice was made after extensive hearings and based on committee reports which provided opportunity for the presentation of the views of all concerned parties and which specifically found that "the equities and rights of all who are involved" were given due recognition. The conclusion is therefore mandated that the Congress intentionally omitted any provision for the reassignment of this cause of action to an employee, any provision for the concurrent holding of this cause of action by both the employee and employer, and any provision permitting the avoidance of the assignment because of a conflict of interest. As this Court has recently stated in construing another section of the LHWCA,

> "[O]ur examination of the language and legislative history . . . convinces us that the omission was intentional. Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.'" *Director, Office of Workers' Compensation Programs* v. *Rasmussen*, 440 U.S. 29, 46-47 (1979).

The subsequent legislative developments, if anything, support this conclusion. Thus, in 1972, Congress did not

amend section 33 of the LHWCA but reaffirmed the provisions of section 33 by referring to it in section 5 of the LHWCA. This section, in pertinent part, reads as follows:

> "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, . . . may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act. . . ." 33 U.S.C. § 905(b).

In the intervening period between 1959 and 1972, this Court did not announce any decisions which modified the policy determinations reached by Congress in 1959.

***Judicial Developments***

Prior to the 1959 Amendment, this Court decided *Czaplicki* v. *Hoegh Silvercloud,* 351 U.S. 525 (1956). The holding was summarized by the Court as follows:

> "Since an action by Travelers would, in effect, be an action against itself, Czaplicki is the only person with sufficient adverse interest to bring suit. *In this circumstance,* we think the statute should be construed to allow Czaplicki to enforce, in his own name, the rights of action that were his originally." 351 U.S. at 531 (emphasis added).

Travelers was the workmen's compensation insurer for Northern Dock Company, the employer of Czaplicki, as well as the insurer of Hamilton Marine Contracting Company which, along with the vessel owner and operator, had been sued by Czaplicki in a third party action brought under the LHWCA. By reason of the statutory assignment provided in the LHWCA, 33 U.S.C. § 933(b), Travelers was also the proper statutory party to bring suit on behalf of Czaplicki. Because Travelers insured Hamilton Marine

Contracting Company, one of the third parties subject to suit by the plaintiff under traditional negligence principles, this Court concluded that Czaplicki's rights of action "were held by the party most likely to suffer were the rights of action to be successfully enforced." 351 U.S. at 530. This Court held that the section 33(b) assignment would be ineffective only where the statutory assignee would, by pressing the assignor's claim, subject itself to suit. As the *Czaplicki* Court explained:

> "Czaplicki can bring this suit not because there has been no assignment, but *because in the peculiar facts here* there is no other procedure by which he can secure his statutory share in the proceeds, if any, of his right of action." 351 U.S. at 532-33 (emphasis added).

Shortly after the decision in *Czaplicki,* the Second Circuit had occasion to review the effect of section 33(b) and *Czaplicki. Sabol* v. *Merritt Chapman & Scott Corp.,* 241 F.2d 765 (2d Cir. 1957), rejected the assertion that the assignment provision should be interpreted to permit ownership of the third party action by both the employee and employer. The court observed: "Such a rule would leave third parties subject to suit by both the employer and the employee, the very situation the Congress was attempting to prevent by the assignment section of the statute." 241 F.2d at 767. The court concluded with its interpretation of *Czaplicki,* stating:

> "The holding in Czaplicki . . . , was carefully limited by the court to the peculiar situation there presented. That case has no application here." 241 F.2d at 768.

In *Sabol,* the employee of a stevedore had brought suit against the owner of a scow upon which the employee was allegedly injured while engaged in unloading cargo. The

barge owner asserted as a defense that the employee no longer owned the cause of action because he had accepted payments under a compensation award. The district judge dismissed the libel and this dismissal was upheld on appeal by the Second Circuit.

A year after *Sabol* was decided, the Third Circuit rendered its opinion in *Johnson* v. *Sword Line, Inc.*, 257 F.2d 541 (3rd Cir. 1958). There, the court invoked *Czaplicki* to permit an employee to prosecute a third party action because the employer was subject to an indemnity suit under *Ryan*. The court nonetheless agreed that should the insurance carrier or employer have adequate grounds for concluding that the third party action was not meritorious, then its refusal to commence suit would be proper and the employee should not be permitted to pursue the claim. Notably, the court also refused to permit prosecution of the claim unless it was shown that the employer had a conflict of interest, such as the possibility of an indemnity lawsuit by the third party.

As noted earlier, the reasoning of the Third Circuit was presented to the Congress during the hearings held in 1956. Moreover, the facts of *Czaplicki*, although not the actual decision of this Court, was also placed before the Congress by Czaplicki's own attorneys who testified during the hearings. Hearings, 84th Cong. at 59, 60-62. Both the House and Senate Reports summarized the existing law upon which Congress acted in 1959. Thus, at page 3 of the House Report, it is stated: "Once a compensation award is made to the employee, the right of action against the responsible third party is automatically assigned to the employer. Thereafter, the employee has no control over subsequent action with respect to pursuing or settlement of the claim." *Accord*, S. Rep. No. 428, at 1. Congress evidently viewed *Czaplicki* as did the Second Circuit, *i.e.*, a decision care-

fully limited to its peculiar facts involving an insurer which both held the assignment and represented one of the primary defendants in the third party lawsuit. Thus, as further stated by the House Report, one of the developments under the LHWCA which particularly concerned the committee was "the automatic assignment of a third-party cause of action to the employer and the refusal by the employer to pursue the third-party claim because of a conflict of interest." H.R. Rep. No. 229, at 3.

The amendment which was eventually passed by Congress was drawn in response to this situation and represents the Congressional choice as to the appropriate remedy. The intended operation of this law was spelled out in the Senate Report. S. Rep. No. 428 at 2, quoted *supra.*

Despite the clear presentation of the problem to Congress and the Congressional response by way of an amendment to the LHWCA, two Circuit Courts which were subsequently confronted with the question of the existence of a conflict-of-interest exception to section 33(b) of the Act, chose to ignore the Congressional determination. In *PEPCO* v. *Wynn,* 343 F.2d 295 (D.C. Cir. 1965), the Court viewed the 1959 Amendments as merely supplementing, rather than supplanting, *Czaplicki.* In a *per curiam* opinion of two of the three Circuit Judges, the court held that the employee may prosecute a third party suit when it is evident that the employer-assignee, for whatever reason, does not intend to bring suit. 343 F.2d at 298. The *per curiam* opinion acknowledges that the case did not present the clear conflict of interest that was presented in *Czaplicki* and concedes that it is plausible that the employer "sincerely believed that PEPCO was not liable." 343 F.2d at 297. To avoid an expansion of judicial proceedings by requiring a hearing on the employer's reason for

refusal to sue, the Court interpreted the 1959 Amendments to permit a third party suit by the employee whenever the employer refused to sue. Judge Wright concurred in the result because he found *Czaplicki* to be applicable on its facts, based on the continued liability of the employer in the District of Columbia under *Ryan*. 343 F.2d at 300.

The Fifth Circuit aired its views in *McClendon* v. *Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965). There, a longshoreman sued the owner and operator of a vessel more than six months after the receipt of compensation under an award. The defendants impleaded the longshoreman's employer seeking indemnity based on the stevedore's implied warranty of workmanlike service. The court found that the purpose of the 1959 Amendment was simply to eliminate the election requirement* and to allow an employee to both sue a third party and collect compensation. There being no direct reference to *Czaplicki* in the committee reports, the court refused to find that that decision had been legislatively overruled. Nonetheless, it was also recognized that the plain language of the statute "admits of no exceptions and precludes the construction which we here adopt." 348 F.2d at 302. The court's answer was that the statutory language prior to 1959 was as unequivocal and the Supreme Court was nonetheless able to fashion an exception in *Czaplicki*. Referring to *PEPCO*, the Court refused to endorse a similar broad holding which would have eliminated the requirement that a conflict of interest be demonstrated. 348 F.2d at 303. Thus, the Court ruled that it must be shown in each particular case that a conflict of interest actually exists.

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* This distinction is unconvincing for as this Court noted in *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 455 (1947), "election and assignment are two sides of the same coin." *Accord*, *Czaplicki* v. *Hoegh Silvercloud*, 351 U.S. at 532.

In 1972, Congress enacted extensive amendments to the LHWCA, including section 5(b), 33 U.S.C. § 905(b). This section, among other things, eliminates an employer's liability to a vessel under the principles of *Ryan*. Moreover, as was noted in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 261 n. 9 (1979), Congress increased the compensation benefits, making "a determined effort to narrow the gap between the harm suffered and the benefits payable." Following these amendments, the Second Circuit, in the case here under review and the Fourth Circuit in *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980), analyzed the current viability of a conflict-of-interest exception to section 33(b) of the LHWCA.

In *Rodriguez* v. *Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir. 1980), the circuit court rejected the notion that an employer's desire not to antagonize its customer by bringing a lawsuit is a sufficient conflict of interest to void the assignment provided in section 33(b). As the Court noted, the employee had six months, following the award, within which to bring his own suit against the vessel without any interference or control by the employer. Instead, the Second Circuit followed the interpretation it had reached more than twenty years earlier in *Sabol*, limiting *Czaplicki* to its unique facts. The Court found that this result was impelled both because the 1959 Amendments removed the automatic assignment which had produced such a harsh result in *Czaplicki* and because section 5(b) of the LHWCA eliminates the employer's liability under *Ryan*. In short, the Court refused to rewrite an act of Congress or to overrule a decision of this Court.

In contrast to the Second Circuit, the Fourth Circuit, in *Caldwell*, extrapolating from *Czaplicki* found that regardless of the statutory assignment, the third-party claim

"revested" in the employee when, for whatever reason, the statutory assignee declined to prosecute a third-party claim. This result, which is found in Part III of the Opinion, is all the more surprising because in Part II of the Opinion the Court recognized *PEPCO* as adopting such a rule and rejected it because of its distinct similarity to the proposition that the right of action could be concurrently held by both the employee and employer. 618 F.2d at 1042.

Nonetheless, building on this foundation allegedly supported by the decision in *Czaplicki,* the Fourth Circuit formulated a procedure for the reassignment of the personal injury claim from the statutory assignee to the longshoreman. This procedure includes informal correspondence between the longshoreman and the statutory assignee, as well as a perversion of F.R.Civ.P. 19(a) to allow the employee to commence an action which he does not possess, joining the assignee as an involuntary plaintiff. Despite its statutorily granted all-encompassing control of the litigation, the statutory assignee is then forced to participate in an action which it presumably does not wish to prosecute.* The repeal of section 33(b) of the LHWCA next results in the repeal of section 33(e), the statutorily mandated distribution scheme for actions brought pursuant to section 33(b). 618 F.2d at 1048.

Under *Caldwell,* the employer and its insurer are forced to participate in a lawsuit which they do not wish to bring. The third party is relegated to a constant state of uncertainty regarding the proper party with whom it should be dealing either in settlement negotiations or litigation. The employee, in turn, is encouraged to bring a lawsuit, but is not encouraged to bring the lawsuit within the time period

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* The Fourth Circuit candidly conceded that the statutory assignee's inaction might be prompted by its own good-faith belief that the claim is not meritorious. 618 F.2d at 1045.

adopted by Congress. All of this is necessary because, as the Fourth Circuit itself noted, the employee failed, whether by design or inadvertence, to prosecute his action during the period of time, *viz.* six months plus the lapse of time between the injury and an award, when the claim was exclusively his to bring. 618 F.2d at 1045.

***Interpretation of Section 33(b)***

Petitioner urges this Court to apply the reasoning in *Edmonds* to the issue presented on this appeal. In petitioner's view, *PEPCO* was the law of the land, similar to the judicial rule of joint and several liability in maritime cases amongst concurrent tortfeasors discussed in *Edmonds,* and that Congress, by not substantively amending section 33 of the Act in 1972, relied on *PEPCO.* This supposed reliance then casts *PEPCO,* a two-judge *per curiam* opinion, as the supreme law of the land. It is respectfully submitted that *Edmonds,* though applicable in its reasoning to this appeal, is not applicable for the reasons stated by the petitioner, nor does it support the conclusions reached by the petitioner.

In *Edmonds,* the majority demonstrated, and the dissent was willing to assume, that the rule sought to be changed was the traditional admiralty rule in 1972. The Court supported this conclusion by citation to three Supreme Court cases and by noting that the rule also accorded with the common law on the subject. 443 U.S. at 260 & nn. 7, 8. *PEPCO* simply did not represent the traditional admiralty rule or the prevailing law in 1972 under section 33(b). Indeed, *PEPCO* was not even a maritime case.*

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* Section 33 was mentioned in the 1972 Amendments in section 5(b) of the Act, as noted by this Court in *Edmonds,* 443 U.S. at 260. This latter section, of course, relates solely to maritime actions involving vessels.

As shown in the prior section of this Point, *PEPCO* was noteworthy in 1972, not because it represented the rule, but because it represented an extreme exception to the rule. The rule, of course, was represented by section 33(b). The Second Circuit did not agree with the reasoning in *PEPCO* and had interpreted section 33(b) as enforceable, except in those limited situations where the unique facts of *Czaplicki* were duplicated. The Third and Fifth Circuits certainly did not agree with *PEPCO* since their rule rested upon a finding in each case, and a requirement that in each future case a finding be made, that a conflict of interest existed either due to the presence of a common insurer or due to possible liability under *Ryan*. Indeed, despite statements made in *Joyner* v. *F & B Enterprises, Inc.*, 448 F.2d 1185 (D.C. Cir. 1971), the *PEPCO* decision itself was complicated by Judge Wright's refusal to join in the judicial repeal of section 33(b). The position of the *PEPCO per curiam* opinion was also contradicted by earlier statements made by the same court in *Moore* v. *Hechinger*, 127 F.2d 746, 749 (D.C. Cir. 1942), *discussed in PEPCO*, 343 F.2d at 301 (Wright, J., concurring), wherein it was recognized both that the statute gave the assignee absolute control over the cause of action and that the language of the statute would not support any restriction of that control by permitting the joinder of the employee as a co-plaintiff.

The reasoning in *Edmonds** counsels against the interpretation espoused by petitioner. In 1959, Congress was advised of the problem of a conflict of interest, the *Ryan* decision was brought to its specific attention, and the facts of *Czaplicki* were also brought to its specific attention. Congress chose to resolve the problem by granting the

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* *Edmonds* instructs that this Court will not modify the law which Congress relied upon when it amended the LHWCA, lest judicial change should "knock out of kilter" the delicate balance struck by Congress. 443 U.S. at 273.

longshoreman an additional period of time within which the action was his exclusively to prosecute and then, unconditionally, giving the action to the assignee. It would seem obvious that Congress intended to preserve certainty as to the proper party and also to reduce litigation. *See Sabol* v. *Merritt Chapman & Scott Corp.*, 241 F.2d at 767; *Toomey* v. *Waterman S.S. Corp.*, 123 F.2d 718, 721 (2d Cir. 1941). Congress did not wish to foster disharmony and thereby increase litigation, by permitting a question to remain regarding ownership of the third party cause of action.* The Congressional policy determination should be upheld and enforced by this Court. Accordingly, it would, as in the past, be appropriate for this Court to reject a theory that nowhere appears in the Act and does not comport with the Congressional intent. *See Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. at 271; *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 278-279 (1977).

As was recognized by this Court in *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980) (a case also involving

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* *White* v. *United States*, 507 F.2d 1101 (5th Cir. 1975), is an example of the confusion and problems generated by a continuing conflict-of-interest exception. There, the emloyee commenced no suit in the 6-month period. The shipyard-statutory assignee commenced an action under §33(b) against the manufacturer of the lamp which exploded aboard a vessel injuring White. Thereafter, the shipyard was impleaded by the vessel in a suit commenced by White after the 6-month period. The question for the Fifth Circuit was phrased as follows:

> "What happens, if, as here, the statutory assignee has a conflict of interest (and fails to act) as to one likely defendant but has no adverse interest as to (and sues) another? Is there a statutory assignment of the cause which the assignor sued on, of that he did not sue on also, or of neither?" 507 F.2d at 1103.

The court permitted both actions to proceed, noting that procedural pitfalls might lie along the paths of these duplicative litigations.

section 33 of the LHWCA) it would be erroneous to conclude, following the 1972 Amendments, that the Congress intended to encourage third party litigation. The Court there stated:

> "Indeed, there was considerable testimony during the hearings that third-party actions had resulted in congested courts and that the primary beneficiaries had been lawyers, not injured longshoremen. The Senate Report stated that '[t]he social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.' [S. Rep. No. 92-1125, p. 4 (1972).]" 445 U.S. at 83-84. *Accord, Johnson* v. *Sioux City & New Orleans Barge Lines, Inc.*, 629 F.2d 1244, 1249 (7th Cir. 1980).

Clearly, in 1972 Congress made an important policy determination that longshoremen's remedies should be more closely covered by Workmen's Compensation benefits rather than by burdensome and ultimately ineffective litigation. Such a restriction is intended to place the cost of accidents on employers except in those situations where a vessel's negligence substantially* contributed to the happening of the accident. This restriction of litigation was, in turn, intended to husband the resources of both the shipowner and stevedore to finance the vast improvement in compensation benefits provided by the Amendments. It is the vessel's resources which are ultimately taxed by the LHWCA since the stevedore's compensation costs are passed on to customers in the stevedore's rates. *See, e.g.*, Hearings, 84th Cong. at 100.

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* *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. at 260, 265 n.15, 271 n.30.

This Court has already explained the operation of section 33 of the LHWCA in accordance with its plain language:

> "The Act provides a comprehensive scheme governing an injured longshoreman's rights against the stevedore and shipowner. The longshoreman is not required to make an election between the receipt of compensation and a damages action against a third person, 33 U.S.C. § 933(a). *After receiving a compensation award from the stevedore, the longshoreman is given six months within which to bring suit against the third party. 33 U.S.C. § 933(b). If he fails to seek relief within that period, the acceptance of the compensation award operates as an assignment to the stevedore of the longshoreman's rights against the third party.*" (emphasis added).

*Bloomer* v. *Liberty Mutual Insurance Co.*, 445 U.S. at 77-78. *See also Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. at 269. In *Bloomer*, this Court also noted that the interests of the employer and the longshoreman are no longer conflicting because both stand to gain from a recovery against a shipowner through a meritorious cause of action. 445 U.S. at 84-85. This recognition removes the basis for the decisions of both the Third (*Johnson*) and Fifth (*McClendon*) Circuits as well as by this Court in *Czaplicki*.

Section 33(b) of the LHWCA should be interpreted as written so that the Congressional interest in providing certainty as to the proper party to bring suit and avoiding complicated and continuing questions on this issue may be furthered. Such an interpretation would also further the Congressional intent to reduce litigation by allowing the employer or the employer's insurer, to evaluate a claim,

which an employee has allowed to lay dormant, and determine whether the injuries are sufficiently significant or the cause of action sufficiently meritorious, to justify the commencement of a lawsuit. *See Johnson v. Sioux City & New Orleans Barge Lines, Inc.*, 629 F.2d 1244 (7th Cir. 1980).

It is important to note that the primary purpose for the continuation, in 1972, of the negligence liability of vessels was to encourage safety because the vessel "will still be required to exercise the same care as a land-based person in providing a safe place to work." H.R. Rep. No. 92-1441, 92nd Cong., 2nd Sess., at 6. This purpose is not contravened by a reading of section 33(b), as espoused by the respondent, since the negligence liability of the vessel is not extinguished, and can be enforced by a timely lawsuit.

Recognition that the Congress abrogated any conflict-of-interest exception by the 1959 amendments to the Act also does not work a harsh or incongruous result. As was recognized by the Second Circuit, the longshoreman is given an ample period of time within which to bring suit without any interference by the employer. In the case of Petitioner Barulec, that period exceeded 18 months after the injury. Petitioner Rodriguez had more than twenty months and Petitioner Perez had more than two years after their respective injuries within which to bring suit. Moreover, Congress, in 1972, purposefully sought to reduce this third party litigation by at once increasing the benefits under the LHWCA, thereby making it the primary source of compensation to the employee, and by eliminating both the unseaworthiness and indemnity causes of action which originated in this Court's decision in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 25 (1946), and *Ryan Stevedoring Co., Inc.* Encouragement of such dilatory claims would hardly comport with this Congressional intent.

It should not need saying that the LHWCA is preeminently a compensation act, not a liability act. When it is construed liberally to effectuate its purposes, it is those purposes that deal with the prompt, adequate and uncomplicated payments of compensation to the injured worker that are intended. Both *PEPCO* and *McClendon* sought support for their construction of section 33(b) in cases which liberally construed the LHWCA to effect the prompt, adequate and uncomplicated payment of compensation.* The third party cause of action has never been viewed by Congress as especially vital to the humane interests sought to be furthered by compensation. Accordingly, that action was wholly removed from the employee by the original LHWCA once compensation was paid. The employee gradually received additional rights to prosecute the action, but those rights have always been limited by the assignment provision.**

Even when this Court is confronted with a question of statutory interpretation involving the payment of compensation, this Court has been careful to avoid interpreting the Act in a manner which would be destructive of Congressional determinations. *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197 (1952) is particularly instructive regarding the limits on judicial interpretation in the area of payment of compensation, and *a fortiori* in a case such as this one which does not involve such an issue:

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* *PEPCO* and *McClendon* also did not discuss the legislative hearings which, beyond peradventure, establish that the 1959 Amendments were drawn to remedy the conflict-of-interest problem.

** As noted in *Edmonds*, Congress, in 1972, eliminated the longshoreman's cause of action in unseaworthiness. Indeed, one of the original bills introduced in 1972 would have eliminated all third party causes of action against vessel owners by defining vessels as employers. 443 U.S. at 264 n. 12.

> "We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all." 342 U.S. at 200.

Here, as in *Rasmussen, supra,* Congress could have but did not add a provision, as to revesting or reassignment, as suggested by the petitioner. Moreover, the legislative history commands the recognition that Congress' choice in retaining section 33(b) and incorporating a reference to it in section 5(b) was intentional and must, therefore, be enforced.

## POINT II

**If an Exception to Section 33(b) Exists, That Exception Is Limited to the Exception Stated by This Court in *Czaplicki* v. *Hoegh Silvercloud* and Petitioner Has Failed to Prove Facts Bringing the Claim Within the Exception.**

Petitioner urges this Court not only to find a limited exception to section 33(b) but also to go further and follow *PEPCO,* thereby abrogating the assignment provision entirely. Alternatively, petitioner urges this Court to find that fear of damaging customer relations is a sufficient conflict of interest to allow the commencement of his suit more than eighteen months after the expiration of the statutory six-month period.

A review of this Court's opinion in *Czaplicki* v. *Hoegh Silvercloud,* reveals that there were two considerations of paramount importance to the Court's holding. First, unlike

the usual case, the right to the third party action was held by the party most likely to suffer if those rights were successfully enforced. This factor conflicted with what this Court found to be a presupposition of the statute, namely, that the assignee's interests will not be in conflict with those of the employee. Such a conflict, alone, together with inaction by the assignee, however, was not the only relevant consideration. In addition, this Court looked to the statute itself finding that an assignment had occurred but that the employee could, nonetheless, still press the third party action because "in the peculiar facts here there is no other procedure by which he can secure his statutory share in the proceeds, if any, of his right of action." 351 U.S. at 532-33.

The possibility of inaction on the part of the assignee or action limited to the amount of the compensation lien only, was recognized by Congress in 1959 resulting in the inclusion of a one-fifth bounty to provide an incentive for the assignee to prosecute the claim, assuming it was meritorious. So too, Congress eliminated the situation which occurred in *Czaplicki* where, the insurer forced an award, as was suggested in *American Stevedores* v. *Porello,* 330 U.S. at 455, by filing a notice with the Compensation Commission that any compensation claim would be controverted. 351 U.S. at 525 & n. 2. The result was that the third party claim in *Czaplicki* was assigned within three weeks after the accident by the filing of a compensation award. Presumably, *Czaplicki* was disabled at the time, in need of funds and unaware that the statutory assignee also insured one of the third parties in the third party action.

The situation in *Czaplicki* has hardly been duplicated here. The only conflict of interest which the petitioner points to is an asserted reluctance to bring suit because of a fear that such suit would damage customer relations. No

proof was submitted in support of that proposition to the district court. All that was submitted was an attorney's hearsay affidavit purporting to summarize a conversation had between the plaintiff's attorney and a claims attorney for the insurance company which paid workmen's compensation benefits. Such evidence is clearly insufficient to defeat a motion for summary judgment. F.R.Civ.P. 56(e). Nonetheless, the district judge allowed petitioner 45 days within which to submit competent evidence establishing the existence of a conflict of interest. Upon petitioner's failure to present such evidence, respondent's motion for summary judgment was granted. Even assuming the continued viability of the conflict-of-interest exception announced in *Czaplicki,* therefore, the granting of summary judgment in this matter was entirely correct.

Regardless of the sufficiency of the proofs submitted in opposition to the respondent's motion for summary judgment, the argument that business interests present a sufficient conflict of interest must be rejected. The business interests of the employer and its customer are plain and existed in 1927, 1938, 1959 and 1972. In none of these instances did the Congress see fit to amend the statute, repealing the assignment provision. Indeed, as was earlier noted, during the hearing in May 1956, this possibility was explored. *See* Hearings, 84th Cong., at 43-45. An interpretation of section 33(b) which would permit the avoidance of the assignment because of business interests would result in the nullification of section 33(b) entirely, because "every stevedore would prefer not to give offense to its customer." *Hernandez* v. *Costa Armatori, S.p.A.,* 467 F. Supp. 1064, 1067 (E.D.N.Y. 1979), *aff'd mem.,* 622 F.2d 573 (2d Cir. 1980).

This case is also significantly different than *Czaplicki* because here there was a procedure by which petitioner

could have secured his share in the proceeds of any third party action. Simply stated, petitioner had 18 months within which to commence a third party action without interference or control by his employer or the employer's insurer. Unlike *Czaplicki,* petitioner was not forced to assign his claim within three weeks after his injury.

Petitioner emphatically cites and quotes from *Valentino* v. *Rickmers Rederei, G.M.B.H.,* 552 F.2d 466 (2d Cir. 1977), for the proposition that stevedores do not as a practical matter pursue these lawsuits "presumably for fear of antagonizing their customers." 552 F.2d at 469. In *Valentino,* the court granted the plaintiff's attorney a fee out of a judgment which was less than the stevedore's lien. Thus, the attorney's fee was given priority over the stevedore's lien in the distribution of the judgment in the third party action. The court premised this holding on the finding that "with the abolition of the *Ryan* action in 1972, there is no longer a conflict of interest between stevedore and longshoreman calling for a contrary result." 552 F.2d at 470. It can only be assumed that plaintiff's attorney in *Valentino* did not raise the same argument which is raised by petitioner's attorney in this case, *i.e.,* that the stevedore's business relations place it in a conflict of interest with the employee regarding third party causes of action. Of course, if plaintiff's attorney had urged that argument in *Valentino,* the court might very well have found, assuming it accepted this dubious argument, that plaintiff's attorney should not be given a fee because it would simply charge the stevedore for the privilege of having its business relations damaged. *See* 552 F.2d at 470. The argument would have been disingenuous in *Valentino.* It is no less disingenuous in this case.

Petitioner's argument regarding the adoption by this Court of the rule in *PEPCO* is premised upon the assertion

that *PEPCO* represented the traditional admiralty rule or the prevailing law in 1972, when Congress enacted amendments to the LHWCA. As demonstrated in Point I, this argument is untenable. *PEPCO* was alone in its interpretation of the exception, if any, to be accorded to section 33(b). The other circuits which ruled on the issue prior to 1972 all agreed that a specific conflict of interest must be shown before the assignment could be avoided. Petitioner has failed to demonstrate such a specific conflict of interest in this case.

Finally, should this court find that there is a conflict of interest-exception to section 33(b), it is respectfully submitted that the allocation of the burden of proof on this issue was properly stated by the district court in one of the three cases here under review. Supp. App. to Pet. for Cert. 1e, 29e & n.10; 1f, 8f-11f; 1g, 15g. Simply stated, petitioner seeks to benefit from an exception to an otherwise applicable statutory rule. It is entirely appropriate that the burden of demonstrating that he is exempt from the statutory assignment fall squarely on the shoulders of the party asserting the exemption, *viz.* the petitioner. *See, e.g., Westchester Rockland Newspapers, Inc.* v. *Kimball,* 50 N.Y.2d 575, 430 N.Y. Sup. 2d 574 (1980).

Petitioner has failed to demonstrate a direct conflict of interest between himself and the assignee of the third party cause of action. Accordingly, under the decisions of this Court in *Czaplicki* and the overwhelming majority of circuit courts which have discussed this issue, further inquiry into the motives of the assignee is inappropriate. Petitioner, having had an opportunity to commence and prosecute this action for 18 months after his accident, is not now permitted to attack the validity of the assignment of a cause of action which he chose to ignore while it was his to prosecute.

## CONCLUSION

**Summary Judgment in Favor of the Respondent Should Be Affirmed.**

Respectfully submitted,

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